

STATE OF ALASKA  
v.  
HEIRS OF DINAH ALBERT

IBLA 84-640

Decided December 4, 1985

Cross appeals from the decision of Administrative Law Judge Michael L. Morehouse finding that entitlement to Native allotment F-35085-B had been established and concluding that the Native Allotment Certificate should issue subject to State of Alaska rights-of-way F-39 and F-034891.

Appeals dismissed.

1. Rules of Practice: Appeals: Dismissal

Pursuant to 43 CFR 4.411, a notice of appeal must be filed within 30 days of the date the person appealing is served with the decision being appealed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally -- Contests and Protests -- Rights-of-Way: Federal Highway Act

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a private contest filed by the State of Alaska against such a Native allotment based on the State's claim to certain lands within the allotment as existing Federal Highway Act rights-of-way, which contest is filed more than 180 days following enactment of ANILCA, must be dismissed.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally -- Rights-of-Way: Federal Highway Act

Sec. 905(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(e) (1982), provides

that prior to issuing an allotment certificate, the Secretary will identify and adjudicate designated record entries or applications for title claiming lands described in the allotment application. A Federal Highway Act grant is neither a record entry nor an application for title within the meaning of that section.

APPEARANCES: Judith K. Bush, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for the heirs of Dinah Albert; Randy M. Olsen, Esq., and Linda L. Walton, Esq., Office of the Attorney General, Fairbanks, Alaska, for the State of Alaska.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

The heirs of Dinah Albert and the State of Alaska have each filed an appeal from the May 7, 1984, decision of Administrative Law Judge Michael L. Morehouse issued following a hearing held pursuant to a private contest complaint filed by the State of Alaska, Department of Transportation and Public Facilities (State), on December 9, 1982, challenging Native Allotment F-35085-B and seeking to establish its continuing entitlement to rights-of-way F-034891 and F-39. In his decision Judge Morehouse found Albert had satisfied the allotment requirements and concluded that a Native Allotment Certificate should issue subject to State of Alaska rights-of-way F-39 and F-034891.

On January 11, 1966, Dinah Albert filed a Native allotment application describing, inter alia, "Tract #2 the island located in the center of the Tanana River \* \* \*" (Exh. B-1). 1/ Albert claimed use from 1938 of the island located near the village of Nenana. On April 19, 1966, Albert signed a document relinquishing her claim to the island (Exh. B-4). On September 12, 1967, Albert filed another Native allotment application describing "T. 4 S., R. 8 W., F. M. Sec. 14: Lot 3" (Exh. B-5). A third Native allotment application was filed by Albert on February 6, 1968, describing: "An island in the Tanana River near Nenana once described as lot 4, section 14, T. 4 S., R. 8 W., F. M. containing 20.36 acres." (Exh. B-6). 2/

The State applied for highway right-of-way F-034891 on November 2, 1965, in part describing lot 4, sec. 14, T. 4 S., R. 8 W., Fairbanks Meridian. The Bureau of Land Management (BLM) granted that right-of-way on December 9, 1965 (Exh. A-4). On August 15, 1966, the State filed another application

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1/ References are to exhibits presented at the hearing.

2/ Albert's 1967 application described an "island" which she subsequently relinquished. Her 1967 application described "Lot 3." Lot 3 is shown on a survey map (Exh. B-12) as an island in the Tanana River containing 6.70 acres. Albert's 1968 application refers to lot 4 containing 20.36 acres. The same survey map (Exh. B-12) shows lot 4, containing 20.36 acres, to be an island in the Tanana River adjacent to the island described as lot 3. The record indicates that these two islands were at the time of the hearing and for sometime previously thereto joined together as one piece of land.

seeking a right-of-way in part on the same island, described as lot 4. On November 16, 1966, BLM issued right-of-way F-39 (Exh. A-5). <sup>3/</sup>

The allotment in question in this case was field examined by BLM in both 1969 and 1974. Each time the examiner indicated compliance with the use and occupancy requirements of the Native Allotment Act of 1906, as amended, 43 U.S.C. § 270-1 through 270-3 (1970) (repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), subject to pending applications) (Exhs. B-7 and B-8). A February 5, 1975, letter from BLM to Albert stated, "Your Native Allotment Application F-035085 has been approved." The letter also stated that following survey approval further action would be taken to issue the allotment certificate (Exh. B-9).

Subsequently, on December 2, 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), section 905(a)(1) of which, 43 U.S.C. § 1634(a)(1) (1982), approved on the 180th day following December 2, 1980, subject to valid existing rights, with certain exceptions, all Native allotment applications which were pending before the Department of the Interior on or before December 18, 1971. Section 905(a)(5) of ANILCA provided that section 905(a)(1) of ANILCA would not apply where, inter alia, on or before the 180th day:

(B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist; or

(C) A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity.

On May 12, 1981, the State of Alaska, Department of Natural Resources, filed a protest of F-35085-B, pursuant to section 905(a)(5) of ANILCA, alleging that the lands within the allotment had been patented to the State (Exh. B-10). On January 18, 1982, BLM summarily dismissed the protest stating:

The protest filed by the State of Alaska did not state that the land described in the allotment application is the situs of improvements claimed by it or that any of these lands are necessary for access. There is no provision in ANILCA which would

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<sup>3/</sup> These rights-of-way were secured by the State in order to construct a highway bridge on the island. That bridge is presently located on the island.

allow the State to protest allotment applications on the basis that land may be patented to them [sic]. Therefore, as this protest was filed by the State of Alaska pursuant to section 905(a)(5) of ANILCA and failed to meet the stated criteria for a valid protest, it must be and is hereby summarily dismissed.

The State of Alaska did not appeal the dismissal.

In December 1982 the State filed the private contest involved in this case and, following the hearing, Judge Morehouse issued his decision. <sup>4/</sup>

On appeal the heirs of Albert challenge the Judge's ruling that the allotment should be subject to the State's rights-of-way. Also they renew the motion to dismiss the contest proceedings which was presented to Judge Morehouse at the hearing and denied by him in his decision. The State, on the other hand, argues that the Judge erred in finding compliance with allotment requirements and also in ruling that a highway by use had not been established across the allotment in accordance with Revised Statute 2477, 43 U.S.C. § 932 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793).

We will first consider the appeal filed by the State. Judge Morehouse's decision is dated May 7, 1984. The return receipt card in the file shows receipt of that decision by the State on May 10, 1984. The regulations, 43 CFR 4.411, require that an appeal be filed in the proper office within 30 days of receipt of the decision sought to be appealed. The State's "Notice of Cross Appeal," postmarked June 15, 1984, was received by Judge Morehouse on June 19, 1984.

[1] Departmental regulation 43 CFR 4.411 requires that a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which appeal is sought. The timely filing of a notice of appeal is essential to establish the jurisdiction of the Board. The failure to file a timely notice of appeal mandates dismissal of the appeal. Gary T. Suhrie, 75 IBLA 9 (1983); Lynn Dahle, 58 IBLA 73 (1981).

The State's notice of appeal was due on June 11, 1984, the first day that Judge Morehouse's office was open following the expiration of the 30-day appeal period, but was not filed in that office until June 19, 1984. Furthermore, the notice of appeal was not transmitted to Judge Morehouse until June 15, 1984, after the end of the filing period, so that the provisions of 43 CFR 4.401(a), establishing a grace period for filing in some circumstances, do not apply here. Accordingly, we must dismiss the appeal filed by the State. <sup>5/</sup>

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<sup>4/</sup> The State originally filed the contest in August 1982, but BLM dismissed it in November 1982 because the State had failed to file in the proper BLM office. The State then filed the contest in the BLM Fairbanks District Office on Dec. 9, 1982.

<sup>5/</sup> One of Judge Morehouse's rulings for which the State sought review was that no Revised Statute 2477 right-of-way had been established across the

In the appeal of the heirs of Albert, counsel argues that the Judge erred in failing to grant the motion to dismiss the contest proceeding. At the commencement of the contest hearing, counsel for Albert made a motion to dismiss the contest upon which the Judge reserved ruling (Tr. 3). In the motion counsel argued for dismissal on two grounds. First, she alleged that because the allotment lies within a core township of a Native village, under the Board's decision in State of Alaska v. Sarakovikoff, 50 IBLA 284, 287-88 (1980), the State's exclusive remedy, if any, was to file a protest. Counsel asserted the State filed a protest in 1981, pursuant to ANILCA, but it was dismissed. Second, counsel argued the contest was not initiated in a timely manner because in accordance with State of Alaska v. Jimmie, 48 IBLA 370 (1980), the State had 60 days from approval of Albert's allotment in which to file a protest. Since Albert's allotment was approved in 1975, counsel contended the 1982 contest was untimely.

In his decision Judge Morehouse denied the motion to dismiss. He disagreed with counsel for Albert that the Sarakovikoff case mandated dismissal of the private contest. Judge Morehouse, citing the Sarakovikoff holding that the interest necessary to enable a party to initiate a private contest is an interest in land grounded on a specific statutory grant, stated that these rights-of-way were applied for and granted pursuant to the Federal Highway Act, 23 U.S.C. § 317 (1982), and, therefore, qualified as a basis for initiating a private contest. <sup>6/</sup> Despite that holding, he concluded that section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), was intended by Congress to establish a specific time limit after which no objection could be brought to the granting of a Native allotment. Nevertheless, he did not dismiss the contest. He stated:

I don't believe that this contest should be dismissed because of 43 U.S.C. § 1634(e).  
That subsection states:

Prior to issuing a certificate for an allotment subject to this section, the Secretary shall identify and adjudicate any record entry or application for title made under an Act other than the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or the Act of May 17, 1906, as amended, which entry or application claims land also described in the allotment application, and shall determine whether such entry of application represents a valid existing right to which the allotment application is subject. Nothing in this section shall be construed to affect

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allotment. That ruling was clearly improper. The Department has consistently held that the existence of a Revised Statute 2477 right-of-way is ultimately a matter for state courts, except in limited circumstances not presented in this case. See Nick DiRe, 55 IBLA 151, 154 (1981); Alfred E. Koenig, A-30139 (Nov. 25, 1964).

<sup>6/</sup> The interest asserted by the State in Sarakovikoff was a State selection which the Board found did not constitute a sufficient interest to maintain a private contest.

rights, if any, acquired by actual use of the described land prior to its withdrawal or classification, or as affecting national forest lands.

To dismiss this contest and require the state to file a protest if the certificate issued by BLM to Mrs. Albert was not subject to the state rights-of-way would be merely to duplicate at considerable time and expense what has already transpired. Under the above quoted subsection (e) the Secretary is required to adjudicate prior to issuing a certificate for an allotment whether any other entry or application represents a valid existing right to which the allotment application is subject. A hearing has been held, briefs filed, and this is the time to make that determination.

Decision at 10.

On appeal counsel for Albert renews her motion, agreeing with Judge Morehouse that ANILCA established a time limit for objection, but disagreeing that section 905(e) is applicable where an allotment has been adjudicated under the 1906 Act and approved. She states, "[A]bsent a timely objection, under ANILCA, the state is foreclosed from later challenging the approval of the allotment" (Statement of Reasons at 10 (footnote omitted)).

We will review the pertinent facts in order to address the issue raised by this motion. BLM approved Native allotment F-35085-B in 1975. Certificate of allotment did not issue because of a survey backlog. Apparently the State was not informed of the approval, but it is unclear that notice would have precipitated any action by the State at that time. 7/ In addition, the allotment application filed by Albert in 1968 for lot 4 specifically recognized the State's rights-of-way. 8/

In December 1980 Congress passed ANILCA. Section 905 of ANILCA provided for statutory approval of specified allotment applications subject to the right of the State and others to file protests on certain grounds within a designated time period. Although the State of Alaska, Department of Natural Resources, filed a timely protest which was summarily dismissed by BLM, the State of Alaska, Department of Transportation and Public Facilities, did not challenge F-35085-B seeking to protect its rights-of-way. Again, given the past practice of BLM, cited by the State, it is not clear that the State would have had to protest to protect its rights-of-way.

The State asserts its first notice of a possible problem with the rights-of-way came in a December 12, 1981, letter from the Tanana Chiefs Conference, Inc. (Tanana Chiefs). Attached to that letter was a copy of a

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7/ The State represented in its posthearing brief to the Administrative Law Judge that where State right-of-way grants preceded the filing of allotment applications, but postdated alleged use and occupancy, BLM had "in the past" issued allotment certificates subject to such State rights-of-way (State's Posthearing Brief at 6).

8/ Albert stated in the application, "It is realized that there is a right-of-way for highway purposes and rights-of-way for materials on the land."

"Trespass Complaint on Trust Property" signed by Albert stating, "Rights-of-way were granted over my allotment to the State and GVEA [Golden Valley Electric Association] for a bridge and powerline w/o my permission & w/o compensation." The State, however, received no notice from BLM that its rights-of-way might be cancelled (State's Posthearing Brief at 7).

On June 28, 1982, the State received another letter from the Tanana Chiefs stating:

Mrs. Albert's allotment was approved by the Bureau of Land Management on February 5, 1975, and is being processed toward a final certificate of allotment in her name.

We have been informed by BLM that no rights-of-way will be reserved in the Certificate since Mrs. Albert's occupancy (July 1938) predates your rights-of-way grants from BLM.

Subsequently, the State filed the contest involved herein. The State acknowledges that the contest was initiated in response to the Tanana Chiefs' letters. It admits that it never received any notice from BLM that its rights-of-way would be cancelled and that it "had no reason to believe such would possibly occur until it received correspondence from Tanana Chiefs so indicating" (State's Posthearing Reply Brief at 4).

[2] We agree with Judge Morehouse that ANILCA imposed a time limitation on challenges to Native allotment applications, subject to valid existing rights. The State specifically was invited to protect its interests in access and improvements within 180 days of enactment of ANILCA. 43 U.S.C. § 1634(a)(5)(B) and (C) (1982). The State filed no ANILCA protest relating to its rights-of-way, presumably because it assumed they would be protected. Nevertheless, we find the subsequent action by the State to challenge the allotment in this case to be untimely under ANILCA. Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1982), was intended to promote allotment finality and thereby promote conveyance finality. S. Rep. No. 413, 96th Cong., 2nd Sess. 237, reprinted in 1980 U.S. Code Cong. & Ad. News 5181. The intent of that section would be frustrated by allowing the State to come forward after the statutorily imposed time limit and attempt to defeat those allotments legislatively approved by ANILCA. The State cites State of Alaska v. Jimmie, supra, as authority for filing a private contest of an allotment. Admittedly, that decision stated that BLM should allow the State 60 days from notice of allotment approval in which to file a contest. That decision, however, was issued prior to the passage of ANILCA. Section 905(a) of ANILCA constituted notice to the world that specified allotment applications would be approved after the passage of 180 days without protest. We find that under the language of ANILCA the State could have filed a private contest or a protest within that statutory period. When it did not, it was barred from challenging the validity of F-35085-B.

[3] Despite his conclusion that Congress established a time limit after which no objection to granting an allotment could be raised, Judge Morehouse invoked section 905(e), 43 U.S.C. § 1634(e) (1982), to save the contest from dismissal. We find that subsection to be inapplicable. It relates specifically to identification and adjudication of "any record entry

or application for title." The vested right-of-way grants involved herein are neither entries nor applications for title. Entries of the public lands may be of two types, one leading to rights in public lands under the settlement laws (i.e., homesteads, trade and manufacturing sites, etc.) and the other to rights in public minerals under the mining law. The first type of entry is made by notation to the BLM records upon application of an entryman, the latter by actual location and discovery of a valuable mineral deposit. L. Mall, Public Land and Mining Law 168 (3rd ed. 1981). While record entry could refer to either a settlement entry or a mineral entry, 9/ a right-of-way grant is neither. Nor is a right-of-way grant an application for title. The rights-of-way in question were granted pursuant to 23 U.S.C. § 317. Under the regulation in existence at the time of the grants, 43 CFR 2234.2-4 (1966), such grants did not confer title in the land. They constituted a right to use the land until no longer needed. 10/ Even if the grants could be considered as passing title, they were issued in the 1960's, and, at the time of enactment of ANILCA, they were not applications. It appears that the intent of section 905(e) was to adjudicate those record claims of title to land, pending on December 2, 1980, which conflicted with allotments and to determine whether those claims represented valid existing rights to which an allotment should be subject. Section 905(e) does not cover existing right-of-way grants.

For the above-stated reasons, we conclude that Judge Morehouse should have granted the motion to dismiss the contest. BLM approved Albert's allotment F-35085-B in 1975. Although the State claims no notice of that approval, ANILCA provided notice of approval. The State's subsequent contest of the validity of F-35085-B was barred by ANILCA.

The present record indicates BLM has not taken any action to cancel the State's rights-of-way or to otherwise affect the State's interest in its rights-of-way. Thus, there has been no decision from BLM adversely affecting the State vis-a-vis its rights-of-way.

We note that it is unlikely that BLM will take action adverse to the State's interest in these rights-of-way. The record facts show that although Albert's use and occupancy in lot 4 commenced in 1938, at the time the State applied for and received its right-of-way grants (1965 and 1966), Albert had only an inchoate preference right to an allotment, her allotment application for lot 4 being filed in 1968. 11/ Her inchoate preference right did not

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9/ Since 1979 mining claimants holding or locating mining claims on public lands have been required to record those claims with BLM. 43 U.S.C. § 1744(b) (1982).

10/ Subsection (b)(iii) of 43 CFR 2234.2-4 (1966) provided:

"If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary of Commerce and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated."

11/ The record establishes that an earlier allotment application for lot 4 filed in January 1966 was knowingly and voluntarily relinquished on Apr. 20, 1966.

become a vested right until the filing of her application. See United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). The vesting of the allotment and the subsequent approval of the allotment cannot defeat the previously granted State rights-of-way. See Golden Valley Electric Association, 85 IBLA 363, 365 (1985). <sup>12/</sup> If for some reason BLM were to cancel the State's right-of-way grants, the State would have the right to appeal to this Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

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Bruce R. Harris  
Administrative Judge

We concur:

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Will A. Irwin  
Administrative Judge

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Wm. Philip Horton  
Chief Administrative Judge

<sup>12/</sup> In this regard Judge Morehouse's conclusion that the allotment should be subject to the rights-of-way is consistent with the law.

